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April 27, 1979

Honorable Gerard P. Conley
Senate Minority Leader
State House
Augusta, Maine 04333

Dear Senator Conley:

This letter responds to your oral inquiry as to the legality of the appointment of Mr. Paul D. Emery to a full term as a member of the Maine Labor Relations Board (the "Board").

For the reasons explained below, we have concluded that when he was appointed for an independent four year term on June 14, 1978, Mr. Emery should have been appointed only to serve out the remaining unexpired term of his predecessor (Robert D. Curley), whose term of office expired on September 30, 1978. Accordingly, Mr. Emery is presently serving legally as a "holdover." He is entitled to remain in office until his successor is appointed and qualified.[1]

The investigation and analysis which led to the foregoing conclusions revealed similar deficiencies in other appointments to the Board, which will also be addressed in this opinion. It should be emphasized, however, that the status of Mr. Emery, or any other member of the Board, as a holdover affects only the term of office, not the legality of Board action.

I. Factual Background

While the history underlying the problem is rather complicated, its full recitation is necessary to understand the conclusions reached in this opinion.

A. The Present Status of the Board

The Board presently consists of 3 members and 6 alternates appointed by the Governor and confirmed by the Legislature. Section 968 of the Municipal Public Employees Labor Relations Law, 26 M.R.S.A. §961 et seq. (the "Act"). One member and 2 alternates represent

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1/ Mr. Emery was and still is eligible for reappointment for a full four year term commencing October 1, 1978, and expiring September 30, 1982.

employees, another and his alternates represent employers, and the third and his alternates represent the public. Id. The public member is the chairman and his alternates are alternate chairmen. Id.

Thus the Act first divides the Board into principal "members" and "alternates" who replace their respective principal members when they are absent.[2/] It then further classifies the Board into one of three representative categories -- those representing employees, employers and the public. The Board is still further classified according to terms of office. The Act provides that:

> The term of each member and each alternate shall be for a period of 4 years; provided that of the members and alternates first appointed, one member and 2 alternates shall be appointed for a period of 4 years, one member and 2 alternates shall be appointed for a period of 3 years and one member and 2 alternates shall be appointed for a period of 2 years.

B. History of the Board

The Board (then called the "Public Employees Labor Relations Appeals Board") was created in 1969. P.L. 1969, c. 424, §1. The original act provided for 3 members, with no alternates, who were to serve straight 4 year terms. Three members were duly appointed for four year terms beginning December 2, 1969.[3/]

In 1972 the original act was "repealed and replaced" with legislation providing (in the same language as the existing Act) that the "members first appointed", instead of having straight 4 year terms, would be appointed for 2, 3, and 4 year terms and thereafter for 4 year terms. P.L. 1971, c. 609, §9. [emphasis added] This legislation was effective as of June 9, 1972. Later that month the Governor appointed 3 new members to the Board -- the member representing employers to serve a 2 year term, the member representing employees to serve a 3 year term and the public member to serve a 4 year term.

2/ The "alternates" were first introduced in 1973. P.L. 1973, c. 610, §1. L.D. 1651 (March 29, 1973), in the "Statement of Facts," explains:

> [I]n order to assure continuity of representation of employer, employee and public interests on the board, this bill provides for the appointment of alternates who would serve in the absence of principal members of the board. This procedure will guarantee a continuation of fair, expeditious and impartial administration of the Act.

3/ All data relating to individual appointments were derived from records in the Secretary of State's Office.

The 1972 legislation was "repealed and replaced" in 1973 with legislation introducing 3 alternates and providing (in the same language as the existing Act) that of the "members and alternates first appointed," one member and one alternate would be appointed for 2 years, etc. P.L. 1973, c. 610, §1. [emphasis added] This legislation was effective as of October 3, 1973. Later that month the Governor reappointed the same 3 members to the Board, but changed their term designations. The employee member was given a 2 year term (instead of a 3 year term) the employer member was given a 3 year term (instead of a 2 year term) and the public member was again appointed for a 4 year term, all terms commencing October 10, 1973.

The appointments of alternates in 1973 followed the same pattern. The Governor appointed an employee alternate to a 2 year term, an employer alternate to a 3 year term and a public alternate-chairman to a 4 year term, all commencing October 10, 1973.

In 1975, the statutory composition of the Board was changed for the third and final time. Repealing and replacing legislation provided for 2 alternates (instead of one) for each member. P.L. 1975, c. 564, §22. This legislation was effective as of October 1, 1975.

As of January 1975 the composition of the Board, as constituted in 1973, remained unchanged -- viz., the terms of the employee member and his alternate were due to expire October 9, 1975, the employer member and his alternate on October 9, 1976, and the public member and his alternate on October 9, 1977.

Beginning in 1975 and in subsequent years, appointments were made in the following manner: First, after the enactment of the 1975 legislation, the Governor did not reconstitute the Board with a common commencement date for all members and alternates as had been done in 1973. Members and alternates as of the effective date of the 1975 legislation continued to serve their terms as previously designated until they resigned or were reappointed. Second, when a member or alternate resigned, his successor was not appointed to serve out the remaining term of his predecessor, but he was given a full 4 year term. Third, when a member or alternate resigned or his term expired, the commencement date for the term of the successor was designated to begin on the date when the successor appointed was confirmed, which in some cases was months after the term expiration or resignation of his predecessor. Fourth, when the three newly authorized alternates were appointed following the 1975 legislation, their initial term designations (as a 2, 3, or 4 year appointee) did not correspond with the existing representative classifications. For example, the new public alternate was given a 3 year term, whereas previously the initial public member and the public alternate both had been designated as 4 year terms.

The terms of office of the Board members, resulting from the methods of appointment just described and to be examined in this opinion, are reflected in the records in the Secretary of State's Office as follows: one member's term is due to expire on March 2, 1980 and 2 members' terms are due to expire on June 13, 1982; of the 6 alternates, 2 terms expired in 1978 without reappointments, 2 are due to expire on different dates in 1980 and 2 on different dates in 1982.

C. Mr. Emery's Status

Turning to Mr. Emery's situation, the same records reflect that he was appointed as an employer member of the Board on June 14, 1978, to serve a full 4 year term, replacing a member whose term was due to expire in March 1979. If, under the Act, the Governor had the authority to appoint Mr. Emery to a full and independent 4 year term upon the resignation of his predecessor, then that would end the matter. The appointed term is valid. If, however, Mr. Emery should have been appointed only to fill out the unexpired term of his predecessor, then it becomes necessary to ascertain the term of his predecessor.

II. Reasoning

A. The Length of Appointments to Fill Vacancies

The threshold question may be stated as follows: when a member of the Board does not complete his appointed term

(1) is there a vacancy in the unexpired term of the prior officeholder, limiting the term of office of the successor to the unexpired term of his predecessor; or

(2) is there a vacancy in the office itself, permitting the Governor to appoint the successor to serve an independent 4 year term?

Whereas many statutes creating boards and commissions provide a direct answer to this question,4/ the Act is silent on this point. Under these circumstances, the general rule is that there is a vacancy in the unexpired term (permitting an appointment for the remainder of that term only) when both the duration of the term of an office and the time of its commencement or termination are fixed by constitution or statute. 67 C.J.S., Officers, §79 at 395-96; 63 Am. Jur. 2d. Public

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4/ See, e.g., the statute governing the Public Utilities Commission, 35 M.R.S.A. § 1 ("Any vacancy occuring in said commission shall be filled by appointment for the unexpired portion of the term in which such vacancy occurs.").

Officers and Employees, §155 at 723-24.[5/] Both criteria of this rule are satisfied in the present case.

Under the Act, the terms of office of the members are fixed in duration. The staggered nature of the Board also operates to fix dates of commencement and termination for each term of office. In this latter connection, the plain intent of the Act is that after the initial term of two, three and four years expire, new and consecutive terms of four years in duration will respectively commence and in regular order terminate in rotation.[6/] This common mechanism for maintaining staggered terms of office can only operate if all the initial terms commence on a common date and all subsequent terms of office commence and expire by reference to the system of rotation thus established. Thus, the Act, by necessary implication, must be interpreted as fixing not only the duration but the commencement and termination dates of the terms of office for the Board.[7/]

5/ On the other hand, some cases have held that there is a vacancy in the office itself (permitting a replacement appointee to serve an independent term) where the duration of the term of office is alone fixed, without reference to the beginning or end of the period. Id. The rationale of these cases is that when a vacancy occurs the term is gone and the office reverts to the sovereign or people to be filled again on like conditions for the full term prescribed. Id.

6/ See the leading case of Boyd v. Huntington, 11 P.2d 383, 384 (Cal. 1932) interpreting virtually identical statutory language.

7/ See, French v. Cowan, 79 Me. 426, 432-33 10 A. 335, 337 (1887):

> If we were to give any other construction to this statute in relation to the commencement and duration of the terms of office of the marshall and the policemen, the terms of service of the appointees might soon become such as to entirely destroy the force of the provision that one-third, as near as may be, should be appointed each year. The results of any other construction may properly be anticipated, and . . . is a legitimate and strong argument against such construction, and it might well be presumed that the legislature did not intend any such results.

Compare, Wilson v. McCarron, 112 Me. 181, 91 A. 839 (1914) describing the foregoing as dicta but not disagreeing with its application to the staggered police force.

It therefore follows from the general rule recited above that when a vacancy occurs on the Board, the Act contemplates that there is a vacancy in the unexpired term of office and a successor may be appointed only to serve out that term and not an independent term.[8/] Accordingly, we conclude that Mr. Emery should not have been appointed for an independent term but should have been designated to serve out his predecessor's term.

Having reached this conclusion it becomes necessary to determine the commencement date of the term of Mr. Emery's predecessor. This inquiry, by its nature, requires an examination of the commencement dates of all the staggered terms of the Board.

B. The Commencement Date for the Terms of Office of the Board Members

(1) The General Requirement of a Common Commencement Date for Initial Terms

Again, we start with the general rule: a term of office commences at the time fixed by law, but, where no time is fixed, the term begins on the date of appointment in the case of appointive offices. 67 C.J.S., Officers, §68 at 376; 63 Am. Jur. 2d, Public Officers and Employees, §151 at 722.

The Act does not specifically fix a commencement date for terms of office of the Board. However, as pointed out above, the legislative directive that the Board's terms be staggered does require by necessary implication that all initial terms commence on a common date and that all subsequent terms rotate in consecutive order in reference to that common date. Therefore, whether one applies the general rule or merely examines the necessary mechanics for establishing and maintaining a staggered board, the conclusion is the same. The Act contemplates that the commencement date for a Board member will be fixed in relation to a common date established for all initial terms of office, which is not necessarily the date of the appointment of the member.

(2) The Legislation Governing the Common Commencement Date

The next step in the analysis is to identify which legislation governs the common commencement date - - the original act creating the Board in 1969, the 1972 act creating staggered terms, 1973 act introducing the first 3 alternates, or the 1975 act adding 3 more alternates?

It is clear that the 1969 legislation is not controlling. The 1972 legislation establishing an entirely new scheme of staggered terms obviously overrides the prior legislation.

8/ The same conclusion can be reached by simply recognizing that a staggered board would lose its identity as such if independent terms were created for successor appointees. See the September 7, 1977 opinion of this office to the Land Use Regulation Commission, a copy of which is attached hereto.

What effect should be given to the legislation in 1973 and 1975?[9/] The legislation in these years did not change the number of members. Both acts dealt with alternates. As indicated previously, the executive practice has been inconsistent under these acts. In 1973 one Governor reappointed the entire Board, designating new terms commencing at a time shortly after the effective date of the legislation (October 3, 1973). A new Governor was in office when the 1975 legislation was effective (October 1, 1975) and he did not reappoint a new Board. As a consequence, the presently designated terms are wrong in any event because either (i) the 1972 legislation is controlling, being unaffected by subsequent legislation relating to alternates (making the new 1973 appointments invalid) or (ii) the legislation adding alternates should establish a new commencement date (requiring new terms after the 1975 legislation, which were never made).

While it is not clear just what the Legislature in fact intended, the most reasonable construction of the Act and the probable intent of the Legislature was that new commencement terms for the staggered Board should be fixed in reference to the most recent legislation (effective October 1, 1975) reconstituting of the Board. There are several considerations that support this conclusion.

The first is the wording of the Act itself. The Act, in its present form, appears to contemplate a collective appointment of 9 individuals -- 3 members and 6 alternates -- at one time. Speaking in the present and future tenses (i.e., as of and from October 1, 1975), the Act provides that the terms of members and alternates "shall be" for a period of 4 years "provided that of the members and alternates" (i.e., the collective group) "first appointed," one member and 2 alternates shall be appointed for 4 years, one member and 2 alternates for 3 years, etc. [Emphasis added].

Second, there is a strong logical nexus between the term of a principal member and those of his 2 alternates. As earlier explained the alternates are subservient to the members, acting only in the absence of a member, but when alternates act they exercise the full authority of a member they replace. Given the nature of the alternates' function, it is reasonable to assume that when the Legislature established staggered terms for the principal members to create continuity, gradual changes in personnel and maintenance of an experienced majority at all times for the principal members of the Board, it also intended the same qualities to exist in a member's alternate who would be called

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9/ It will be recalled that both acts took the form of "repealing and replacing" legislation. However, in light of the neutralizing effect on the "repealing" legislation which the Maine courts attribute to the "replacing" legislation, it is doubtful that the form of legislation enacted in 1973 and 1975 has any substantive bearing on the present analysis. See, State v. Bean, 159 Me. 455, 195 A.2d 68 (1963) and Thut v. Grant, Me., 281 A.2d 1, 4 (1971). Also see 82 C.J.S., Statutes, §435 at 1011 and 77 ALR 2d 336, 371.

upon to serve in a member's absence.[10/]

Third, although there is a paucity of actual legislative history to any of the acts, that which exists points to an intent to create new terms in 1975. The 1975 legislation derived from a Committee Amendment (H-700, June 10, 1975) which specified in its "Statement of Fact" that the proposal would:

> Change the size, composition and method of selection of the Maine Labor Relations Board to better reflect its concern with the public interest and the public and private sectors and to assure equal representation of these interests and to accomodate [sic] the increase in the board's workload. [emphasis added]

A new and collective commencement date for all members and alternates is not precisely a new "method of selection," but in the absence of other changes in the appointing procedure, it is reasonable to assume that this was intended.

Finally, some weight should be given to prior executive practice. It is not unreasonable to assume that in 1975 (when adding another set of alternates to the Board) the Legislature which was knowledgeable of the Board and its needs was also aware of the Governor's interpretation of similar legislation in 1973 as requiring new terms. If so, it is not unreasonable to further assume that the Legislature would have provided for a maintenance of existing terms for existing members and alternates if that were the intended effect of the new legislation. *See*, 2A Sutherland, *Statutes and Statutory Construction*, §49.09 (2d ed. 1973)

(3) The Manner in Which the Legislation Fixes the Commencement Date

Having concluded that the 1975 legislation governs the fixing of the commencement date for the initial staggered terms for the newly reconstituted Board, the next step in the analysis is to determine how.

Following the enactment of the 1975 legislation, the existing members and alternates were not reappointed or replaced and the 3 new alternate members were not appointed for terms with a common commencement date. Given this fact and the absence of any specific commencement date in the 1975 legislation, the only practical alternative, which presumably reflects the intent of the Legislature, is to conclude that the commencement date for the staggered terms coincides with the effective date of the 1975 legislation -- viz, October 1, 1975. *See*, *Boyd v. Huntington*, *supra*.

10/ The relationship is not unlike that discussed in *French v. Cowan*, *supra*, which led that court to hold that the police chief's term should coincide with that of the staggered police force. It is true that later the court in *Wilson* was not persuaded by this reasoning in *French*, but here the relationship is much more direct and logically compelling.

C. Representative Classification of Terms

The conclusion that the terms of all members and alternates started afresh as of October 1, 1975 still does not fully resolve all questions about Mr. Emery's status. It also must be determined which offices were 2 year, which 3 year and which 4 year terms when they commenced.

It will be recalled that in addition to the division between members and alternates and the staggering of terms, the Board is classified according to representative status -- one member and his alternates represent the public, another and his alternates represent employers and the third and his alternates represent employees. What is the initial term length of each respective class?

To answer this question it must first be determined whether the alternates should be assigned the same staggered term as the respective member under whom they serve. It may be concluded, for all four of the reasons enumerated above for concluding that the adding of new alternates in 1975 required a new commencement of terms, that the Act does require a matching of the terms of members and alternates according to representative status.

However, the Act is completely silent as to which class should be assigned which term. Neither legislative intent nor logic answers this question. It must therefore be concluded that the Legislature granted the Governor the authority to make the designation.

As noted above, in 1973 the Governor designated the employee class as an initial 2 year term, the employer class as an initial 3 year term and the public class as an initial 4 year term. These classifications could have been altered following the passage of the 1975 legislation (just as they were in fact reclassified after the enactment of the 1973 legislation), but they were not. As noted previously, the new Governor only made appointments for the newly authorized alternates and these 3 appointments did not correspond to the previously existing representative classes of members and alternates. Under the circumstances it cannot be assumed that in making the appointments for the 3 new alternates in 1975 and 1976 the Governor intended to redesignate the terms of the entire Board.

Such being the case, each class commencing terms on October 1, 1975 has to have some term designation. In the absence of a new designation, it is only reasonable to carry over the previously existing ones.

D. Additional Principles Relating to the Present Status of the Board

At this point it has been concluded that an appointment to fill a vacancy on the Board can last only for the unexpired term of the officeholder bringing about the vacancy. It has been further concluded that the terms of the entire Board, members and alternates alike, commenced on the effective date of the latest legislation reconstituting the Board -- on October 1, 1975. Finally it has been determined that the employee member and his alternates had an initial term of 2 years,

the employer member and his alternates had an initial term of 3 years and the public member and his alternates a term of 4 years.

Two additional principles must be taken into account before Mr. Emery's status can be finally resolved. First, where a term of office is fixed by law (as we have concluded to be the case here), attempted limitations or extensions of that term by an appointing authority do not render the appointment invalid but are disregarded as surplusage and the appointment is deemed to have been made for the legal term. 67 C.J.S., Officers, §67c at 375; 63 Am.Jur.2d, Public Officers and Employees, §99 at 692; Boyd v. Huntington, supra; and Newman v. Borough of Fair Lawn, Bergen County, 157 A.2d 314 (N.J. 1960). Second, where a term of a member or an alternate has expired without a reappointment or a successor appointment, the officeholder may legally remain in his office as a "holdover" from the previous term and perform all the duties of his office until his successor is properly appointed. 5 M.R.S.A. §3; Atty. Gen. Op. of September 7, 1977, supra. That opinion also concludes the beginning date of the full term is the date of the expiration of the preceding term, without regard to the time served by the holdover. Also see, Bowen v. City of Portland, 119 Me. 282, 111 A.1 (1920); Boyd v. Huntington, supra.

E. Conclusions as to Mr. Emery's Status

As indicated previously, Mr. Emery was appointed to a full 4 year term as an employer member on June 14, 1978. He replaced Robert D. Curley who had been appointed to a full 4 year term as an employer member on March 26, 1975 and who resigned February 1, 1978. We are of the opinion, for the reasons given above, that the employer class was designated a 3 year initial term and that term commenced on October 1, 1975 and expired on September 30, 1978. Because Mr. Curley was not reappointed after October 1, 1975, we conclude that he was a holdover as of that date. When Mr. Emery was appointed on June 14, 1978, his appointment (although designed as for 4 years), in our opinion, should be regarded as having been made for the unexpired portion of the existing term -- that is, until September 30, 1978. He was not reappointed for the next term commencing October 1, 1978 and expiring September 30, 1982 and therefore it is our opinion that Mr. Emery is presently occupying the office legally as a holdover.

F. Status of the Other Members of the Board

Although this office was not asked to opine on the status of other Board members, the foregoing analysis has obvious ramifications for them. Under the circumstances, we think it is advisable to proceed to express our views on the status of other Board members by applying the principles and conclusions expressed above in connection with Mr. Emery.

Edward H. Keith. Mr. Keith was also appointed on June 14, 1978 for an apparent 4 year term as chairman and the public member. He succeeded Walter E. Corey, Jr. who had been appointed as a 4 year public member on October 10, 1973. The public member class was designated as

an initial 4 year term, commencing October 1, 1975 and expiring September 30, 1979. Mr. Corey was not reappointed and therefore in our opinion was a holdover as of October 1, 1975. Mr. Keith was appointed to this term and therefore in our opinion is entitled to serve until September 30, 1979.

Michael Schoonjans. Mr. Schoonjans was appointed to an apparent 4 year term as an employee member on March 3, 1976. He succeeded Mr. Elden Hebert who had been appointed for a 2 year term on October 10, 1973. In our opinion, as of October 1, 1975, Mr. Hebert was a holdover. The employee class was designated as an initial 2 year term, commencing October 1, 1975 and expiring September 30, 1977. Mr. Schoonjans, being appointed during this period, filled out that term. He has not been reappointed for the next term commencing October 1, 1977 and expiring September 30, 1981 and therefore, in our opinion, like Mr. Emery, is presently a holdover.

Paul Haney. Mr. Haney is an employee alternate who was appointed to an apparent 4 year term on October 18, 1978. He replaced Mr. Gary B. Cook who was originally appointed to a 2 year term expiring on October 10, 1975. He was not reappointed to the next term commencing October 1, 1975 and expiring September 30, 1977 and therefore, in our opinion, was a holdover for that term and for the next term commencing October 1, 1977 and expiring September 30, 1981, until Mr. Haney was appointed as his successor. In our opinion Mr. Haney is entitled to fill out the existing term expiring September 30, 1981.

Roland E. Gorman. Mr. Gorman apparently[11/] is the other employee alternate. He was appointed to an apparent 2 year term on June 2, 1976 but which, in our opinion, commenced on October 1, 1975 and expired on September 30, 1977. He was not reappointed for the next term that commenced on October 1, 1977 and expires on September 30, 1981 and therefore in our opinion is presently a holdover.

Kenneth T. Winters. Mr. Winters was appointed as an employer alternate on December 22, 1976 for an apparent 4 year term. He succeeded Mr. Irvine W. Masters, Jr. who was appointed to a 3 year term ending October 10, 1976. Mr. Masters was not reappointed on October 1, 1975 for the initial 3 year term commencing October 1, 1975 and expiring September 30, 1978 and in our opinion was a holdover when Mr. Winters was appointed to that term. Mr. Winters was not reappointed for the next term commencing October 1, 1978 and expiring September 30, 1982 and therefore in our opinion is a holdover.

Henry W. Mertens, Jr. Mr. Mertens was apparently[12/] appointed as the other employer alternate. He was appointed on April 7, 1976 for an apparent 4 year term, but in our opinion filled an initial 3 year term commencing October 1, 1975 and ending September 30, 1978. He was not reappointed to the next term commencing October 1, 1978 and expiring September 30, 1982 and is therefore in our opinion a holdover.

11/ The records in the Secretary of State's Office are not entirely clear as to his representation.

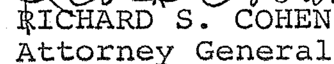
12/ As in the case of Mr. Gorman, the records as to his representative class are not entirely clear.

Donald W. Webber. Mr. Webber was originally appointed as a 4 year public alternate for a term expiring on October 10, 1977. In our opinion he was a holdover as of October 1, 1975 but was reappointed on June 14, 1978 and is entitled to fill out the 4 year term of office which commenced October 1, 1975 and expires September 30, 1979.

Raymond C. McGuire. Mr. McGuire is the other public alternate. He was appointed on December 17, 1975 apparently for a 3 year term. However, in our opinion, the term of office to which he was appointed has a duration of 4 years, commencing on October 1, 1975 and expiring September 30, 1979.

I hope this opinion will be of assistance to you. If you have any questions, do not hesitate to contact me.

Sincerely,



RICHARD S. COHEN
Attorney General

RSC:jg

Enclosure

cc: Representative Gary W. Fowlie